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—THE LATE SIR JOHN SALMOND.

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Landlord's Consent to Alienation of a Lessee's Interest.

III. A QUALIFIED COVENANT.

By virtue of s. 19 (1) of the Law Reform Act, 1936, the covenant on the part of the lessee not to assign is, notwithstanding any express provision to the contrary, qualified by the implied proviso that the consent of the lessor is not to be unreasonably withheld. The onus lies upon the lessee or assignor of showing and proving that the lessor has unreasonably withheld his consent to a proposed assignment.

From *Treloar v. Bigge*, (1874) L.R. 9 Ex. 151, onwards the authorities show that the proper construction to be put on a covenant that the landlord's consent is not to be unreasonably withheld is that it is a qualified covenant; and should the consent of the landlord be withheld from an assignment to a respectable and responsible person an assignment to such a person is not a breach of the covenant: *per* Neville, J., in *Lewis & Allenby (1909) Ltd. v. Pegge*, [1914] 1 Ch. 782, 785. For instance, it was held by Williams, J., in *Cameron v. Nash*, (1900) 19 N.Z.L.R. 396, that in a covenant in the following terms:

> " The lessee will not, without leave in writing first obtained from the lessor, assign, sublet, or part with the possession of the said premises, or any part thereof, and if and when such leave is granted the lessor shall not ask any premium for granting such leave, nor shall such leave be unnecessarily or arbitrarily withheld,"

the final phrase is equivalent to saying that such consent shall not be unreasonably withheld by the lessor. The learned Judge construed the words after " thereof " as not being a covenant by the lessor, but a qualification of the lessee's covenant not to assign without leave; and he held that the lessor could not exercise the power of re-entry on an assignment after leave to assign had been unreasonably withheld.

The same authorities show that even if there are independent covenants by lessor and lessee, these must be construed together when considering reasonableness in withholding consent to an assignment. In *Fuller's Theatre and Vaudeville Co., Ltd. v. Rofe*, [1923] A.C. 435, 439, Lord Atkinson, in delivering the judgment of their Lordships of the Judicial Committee, said:

> " It is well established by the following authorities, amongst others, namely *Treloar v. Bigge*, (1874) L.R. 9 Ex. 151; *Sear v. House Property and Investment Society*, (1880) 16 Ch.D. 387; *Barrow v. Isaacs and Son*, [1891] 1 Q.B. 417; *Eastern Telegraph Co. v. Dent*, [1899] 1 Q.B. 835, that if one finds in a lease a covenant by the lessee not to assign or sublet the demised premises without the consent in writing of the lessor first had and obtained, and also a covenant by the lessor that he will not unreasonably withhold his consent to a subletting or such like, the two covenants must be construed together, with the result that the covenant of the lessee will be held to be qualified by that of the lessor."

It becomes necessary, therefore, to consider what has been held to be a reasonable withholding of consent, and the converse, where a qualification against the unreasonable or arbitrary withholding of consent to an assignment, &c., has been expressly inserted in leases.

The test of whether a lessor's refusal is reasonable varies with the particular facts of each case. In *F. W. Woolworth and Co., Ltd. v. Lambert*, [1936] 2 All E.R. 1523, 1542, Greene, L.J., expressed the opinion that it is a misconception to treat what is subs. (1) of s. 19 of the Law Reform Act, 1936, as though it conferred upon the Court some remedial jurisdiction to relieve the lessee from the covenant or to modify it. He said it was nothing of the kind. He proceeded,

> " It is a statutory addition to the terms of a particular type of covenant, and the proviso which the subsection mentions is to be read into the covenant. What the legal consequences of that may be in relation to a particular set of facts is a matter which will fall to be determined in the usual way. It is quite wrong to look upon this as something which enables the Court to say that a particular set of terms or some particular conditions would be the reasonable thing for the lessor to impose in the circumstances. The practical question which falls to be decided in matters of dispute under this is simply the question: Aye or no, has the covenant been broken? Aye or no, does the covenant, or does it not, apply in the particular circumstances of the case? "

Before these questions can be answered with any satisfaction, the meaning given to the words " reasonable " and " unreasonable " must be ascertained from judicial authority.

IV. WHAT CONSTITUTES " UNREASONABLENESS ? "

The question whether a particular act is reasonable or unreasonable is obviously one that cannot be determined on abstract considerations. An act must be regarded as reasonable or unreasonable in reference to the circumstances in which it is committed; and when the question arises on the construction of a contract, the outstanding circumstances to be considered are the nature of the contract to be construed, and the relations between the parties resulting from it. Here we have to consider the contract which is a lease, and the relation between the parties which is that of lessor and lessee.

In *Treloar v. Bigge*, (1874) L.R. 9 Ex. 151, arbitrary refusal on the part of the lessor was defined as refusal of consent without fair, solid, and substantial cause; and, as the covenant was there qualified by the words " such consent not being arbitrarily withheld," the lessor was held entitled to refuse his consent upon any fair and reasonable ground. In *Barrow v. Isaacs and Sons*, [1891] 1 Q.B. 417, 419, Lord Esher, M.R., considered that " arbitrarily " was equivalent to " wholly unreasonably." In *Quinion v. Horne*, [1906] 1 Ch. 596, 603, Farwell, J., considered that " arbitrarily " and without reasonable cause " were interchangeable terms. And in *Mills v. Cannon Brewery Co.*, [1920] 1 Ch. 38, 45, P. O. Lawrence, J., after discarding dictionary definitions, said that the several learned Judges who decided in the above-mentioned cases were expressing the same meaning although employing different terms; and he

considered that "unreasonably," "wholly unreasonably," and "without reasonable cause" practically mean the same thing.

The test of what a reasonable man would have done in the circumstances was applied by the Court of Appeal in *Stanley v. Ward*, (1913) 29 T.L.R. 714, where the lessees alleged unreasonable withholding of consent and issued a writ when they knew that the lessors were investigating the references of the proposed assignee. The Court held that common sense and common fairness would have suggested the lessees' awaiting the result of that investigation.

As the law now stands, a refusal of consent to an assignment is unreasonable if the reason given for it has no reference to the personality of the proposed assignee, to the user by the proposed tenant of the property, or to the subject-matter of the lease.

The judgment of A. L. Smith, L.J., in *Bates v. Donaldson*, [1896] 2 Q.B. 241, contains a statement of principle regarding the construction of a covenant not to assign without consent "such consent not to be unreasonably withheld in the case of any respectable and responsible person" who might be the proposed assignee. The learned Lord Justice said:

> "It is not, in my opinion, the true reading of the clause, that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted *alio intuitu* altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor, if possible, to coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises."

In *Houlder Bros. and Co., Ltd. v. Gibbs*, [1925] 1 Ch. 131, Tomlin, J., as he then was, had held that the Court has to judge the reasonableness of the lessor's refusal by reference to the personality of the lessee or the nature of the user or occupation of the premises, following the principle enunciated by A. L. Smith, L.J., in *Bates v. Donaldson*, [1896] 2 Q.B. 241, 247. He held, therefore, that the refusal of the lessor was due to his desire to prevent the proposed assignee from giving up other premises, of which he was also the lessor, was unreasonable in that his real purpose in refusing an assignment was not in relation to the demised premises at all, but in relation to other property and to bring pressure to bear on the assignee not to give up a tenancy of different premises belonging to him.

The Court of Appeal (Pollock, M.R., Warrington and Sargant, L.JJ.) affirmed the decision in a judgment which covers most of the questions as to "reasonableness" arising out of s. 19 (1) of the Law Reform Act, 1936: [1925] 1 Ch. 575.

In construing the meaning of the words in the covenant, "such consent is not to be unreasonably withheld" (the words now used in the implied statutory proviso), Pollock, M.R., at p. 581, said:

> "One has to bear in mind that by law in the absence of this covenant the lessees would have had a right to assign the premises as they pleased. The lessor, therefore, took this covenant from the lessees in order to cut down their rights, and to ensure that the premises would not pass to the hands of some person or corporation to whom he could reasonably take objection. Equally, the lessees by accepting the burden of this covenant, on their part, which prevented them from assigning without leave of the lessor, obtained from him those words in the proviso which cut down the right of the lessor to withhold his consent, and prevented him from acting from caprice, or mere prejudice or the like . . . One must look at these words in relation to the premises between the lessor and the lessee; in other words, one must have regard to the relation of the lessor and lessee *inter se*, or, perhaps one may add, to the due and proper management of the property . . . I do not think the words of the covenant can be so interpreted as to entitle the lessor to exercise the right of refusal when his reason given is one which is independent of the relation between the lessor and the lessee, and is on grounds which are entirely personal to the lessor, and wholly extraneous to the lessee."

His Lordship added that, while he thought it was impossible to give an exact definition of the word "'unreasonably" which would fit all cases, he preferred the reasoning which was stated by A. L. Smith, L.J., in *Bates v. Donaldson*, [1896] 2 Q.B. 421, 247, as already set out.

After stating that the covenant was inserted as a protection to the lessor, and that the proviso was inserted in order to prevent the lessor making an unreasonable use of that protection, Warrington, L.J., inferred from what might be treated as having been in the contemplation of the parties when the contract was made,

> "that it was intended to protect the lessor as against a lessee, who, though respectable and responsible, might well be reasonably objectionable in other ways; and, secondly, from the point of view of the property, to prevent the lessor from having to accept a lessee whose user of the property might again be objectionable.
>
> "The user of the property to be reasonably objectionable need not necessarily be objectionable to the lessor as lessor of that particular property. The user of the property might damage the lessor in other ways, and if it did, then the objection to that user would be reasonable; but, whichever way it is looked at, I think you must find in the objection something which connects it either with the personality of the intended assignee suggested as the new tenant of the property, or with the user, which he is likely to make of the property to be assigned to him. When you look at the authorities, this, at any rate, is plain, that in the case in which an objection to an assignment has been upheld as reasonable it has always had some reference to the personality of the proposed tenant, or to his proposed user of the property."

Sargant, L.J., in concurring, said that the reason given for refusal was in respect of completely different property which the proposed assignees held from the lessor and the effect of the consent would probably be the termination of their tenancy of that other property. In his judgment, that was a reason wholly dissociated from, and unconcerned with, the bargain made between the lessor and lessee of the lease in respect of which the consent was withheld, and was, from that point of view, a purely arbitrary and irrelevant reason.

While the principle enunciated in the Court of Appeal in *Houlder Bros. and Co., Ltd. v. Gibbs* (*supra*), has been accepted in the Courts and by text-book writers ever since, the test of reasonableness there proposed was doubted by Viscount Dunedin in *Viscount Tredegar v. Harwood*, [1929] A.C. 72, when, at p. 78, he said:

> "I would like to say, although it is unnecessary to consider whether that case was well decided, I am not inclined to adhere to the pronouncement that reasonableness was only to be referred to some thing which touched both parties to the lease. I should read reasonableness in the general sense."

Lord Shaw of Dunfermline pointed out that, as the matter under consideration was a covenant to insure "in the Law Fire Office or in some other responsible insurance office to be approved by the lessor," the case was completely distinguished from the various cases as to assignment or subletting which had been cited—*e.g.*, the not unusual clause as in *Houlder Bros. and Co., Ltd. v. Gibbs* (*supra*), and the other not unfamiliar clause to the effect that the consent of the landlord "should not be arbitrarily withheld."

Lord Phillimore said that he shared the doubt as to the soundness of the judgment in *Houlder Bros. and Co., Ltd. v. Gibbs*. He added, at p. 82,

> "If it be a question whether a man is acting reasonably, as distinguished from justly, fairly, or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect somebody else."

Lord Blanesburgh did not refer to the judgment in the *Houlder Bros.* case.

In *Premier Confectionery (London) Co., Ltd. v. London Commercial Sale Rooms, Ltd.*, [1933] Ch. 904, the lessee of two tobacconist's shops let under separate agreements and forming part of a large block of buildings used as business premises, applied to the landlord for consent to assign one of the shops to a respectable tenant. Each of the agreements contained a covenant by the tenant to use the premises as a tobacconist's shop only, and not to assign the premises without the previous written consent of the landlord. The landlord's refusal to grant the consent, in the belief that the occupation of the two shops by separate tenants would be detrimental to the property, was held not to have been unreasonable. Bennett, J., without referring to the doubt expressed by two of their Lordships in *Viscount Tredegar v. Harwood* (*supra*) four years previously, applied *Houlder Bros. and Co. v. Gibbs* (*supra*):

> "It is in my opinion clear from the judgments delivered by the members of the Court of Appeal in *Bates v. Donaldson* and in *Houlder Bros. and Co., Ltd. v. Gibbs*, that a landlord may withhold his consent to an assignment because he objects to the use the proposed assignee intends to make of the premises proposed to be assigned, although that use is not forbidden by the terms of the tenancy or by any rule of law."

Summary of Recent Judgments.

COURT OF APPEAL.
1936.
Sept. 17, 18;
Oct. 12.
Reed, A.C.J.
Ostler, J.
Blair, J.
Kennedy, J.
Callan, J.

GOWER AND ANOTHER v. CORNFORD AND ANOTHER.

Practice—Appeals to the Court of Appeal—Application to amend Pleadings and call further Evidence—No Discovery before Trial—Principles on which such Application may be granted—"Special grounds"—Court of Appeal Rules, R. 5.

It is necessary that the rule that fresh evidence may be admitted in the Court of Appeal "on special grounds only" should not be rendered nugatory by too wide an interpretation of those words.

Thomson v. Phillips, (1895) 14 N.Z.L.R. 29; **Te Raihi v. Grice,** (1886) N.Z.L.R. 4 C.A. 219; **Wasteneys v. Wasteneys (No. 2),** (1897) 15 N.Z.L.R. 645; **Union Steam Ship Co. v. Hobbs,** (1893) 12 N.Z.L.R. 98; **De Courte v. Bouvy,** (1899) 18 N.Z.L.R. 392; **Knapp v. Farmers' Milking-machine Co., Ltd.,** [1928] N.Z.L.R. 308; **Sargood v. Dunedin City Corporation,** (1888) 6 N.Z.L.R. 489; **Turnbull and Co. v. Duval,** [1902] A.C. 429; **Sanders v. Sanders,** (1881) 19 Ch.D. 373; **In re Neath Harbour Smelting and Rolling Works,** (1885) 2 T.L.R. 94; and **Nash v. Rochford Rural Council,** [1917] 1 K.B. 384, referred to.

It is only in very exceptional circumstances that the Court of Appeal will permit further evidence to be called on appeal where the appellants fail to show that such evidence could not have been obtained before the trial by the exercise of due diligence.

Where, as in the present case, appellants had made no application for discovery of documents or used other means of obtaining information concerning them, leave was not granted to them to amend their pleadings by the addition to their statement of defence of a clause alleging a new ground of defence and to call further evidence in support of such defence, on the ground of an important document, which was shown to have been accessible at the trial if due diligence had been exercised in calling for it, having come to their knowledge.

So held by the Court of Appeal on a motion for special leave to amend the pleadings arising out of an appeal from the judgment of *Smith*, J., reported [1936] N.Z.L.R. 1.

Counsel: S. A. Wiren, for the appellants; **Cooke,** K.C., and **H. R. Cooper,** for the defendants.

Solicitors: Humphries and Humphries, Napier, for the appellants; **Cooper, Rapley, and Rutherford,** Palmerston North, for the respondents.

Case Annotation: For *Turnbull and Co. v. Duval*, see E. & E. Digest, Vol. 26, p. 218, para. 1726; *Sanders v. Sanders, ibid.*, Vol. 32, p. 458, para. 1250; *Nash v. Rochford Rural Council, ibid.*, Vol. 22, p. 477, para. 5027.

COURT OF APPEAL.
Wellington.
1936.
Oct. 8, 16.
Reed, A.C.J.
Ostler, J.
Blair, J.
Kennedy, J.
Callan, J.

THE KING v. BLACKWELL.

Criminal Law—Practice—Indictment—Charge of Crime and also of Previous Convictions—Substantive Charge to be read to Jury—Reference to Previous Convictions to be Withheld—Proper Procedure for bringing Previous Convictions to Jury's Notice—Crimes Act, 1908, s. 398.

Where a crime, which is complete in itself, is charged on an indictment which also charges a previous conviction or convictions, the procedure is to read to the jury the substantive charge, leaving out all reference to previous convictions, which can only be brought to the jury's notice in strict compliance with the proviso to s. 398 of the Crimes Act, 1908.

Section 398 of the Crimes Act, 1908, should be interpreted as if the words "or part of a count" were implied after the word "count" in the expression "contains a count charging the accused with having been previously convicted"; with the result that any references to previous convictions must be withheld from the jury in all cases where a previous conviction affects only the penalty.

R. v. Penfold, [1902] 1 K.B. 547, followed.

R. v. Campbell, (1904) 23 N.Z.L.R. 760, explained.

R. v. Yep Duk, (1908) 11 G.L.R. 367, referred to.

Under s. 398 of the Crimes Act, 1908:

It is only in the case of "evidence given on behalf of the accused of his good character" that his previous convictions can be brought to the notice of the jury, and then only by evidence being called by the prosecution proving such convictions. If a prisoner whether by himself or his counsel attempts to prove a good character for honesty, either directly by calling witnesses, or indirectly by cross-examining the witnesses for the Crown, it is lawful for the prosecution to give in evidence the previous convictions for the consideration of the jury.

R. v. Shrimpton, (1851) 3 Car, and Kir. 373, applied.

If the evidence is elicited during the course of the case for the prosecution, the evidence of previous convictions should be called before the case for the prosecution closes; but, if the evidence of character is given after the case for the prosecution has closed, then the previous convictions must be proved in reply.

Where no evidence of character is given, the case should go to the jury on the counts alleging the substantive offence, without any reference to previous convictions. If the accused is found guilty, then the allegation of the previous convictions may be dealt with, in compliance with the procedure prescribed by s. 398 of the Crimes Act, 1908—that is to say, if the prisoner denies the previous convictions, they must be proved and a verdict of the jury obtained.

So held by the Court of Appeal on a case stated by *Northcroft*, J., and a new trial ordered.

Counsel: Solicitor-General, Cornish, K.C. for the Crown; **Sargent,** for the prisoner.

Solicitor: Crown Law Office, Wellington, for the Crown.

Case Annotation: For *R. v. Shrimpton*, see E. & E. Digest, Vol. 14, p. 362, para. 3822; *R. v. Penfold, ibid.*, Vol. 14, p. 498, para. 5480.

NOTE:—For the Crimes Act, 1908, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, Vol. 2, title *Criminal Law*, p. 182.

COURT OF APPEAL.
Wellington.
1936.
Sept. 12, 21;
Oct. 12.
Ostler, J.
Blair, J.
Kennedy, J.
Callan, J.

GISBORNE FIRE BOARD AND OTHERS v. LUNKEN.

Prerogatives of the Crown—Practice—Production of Documents—Official Documents—Claim of Privilege—Alleged Prejudice to Public Interests—Power of Court to Inspect—Code of Civil Procedure, R. 604.

In every civil case (whether the Crown is a party or not, and, if a party, whether it is party in a trading or in an administrative capacity) where privilege is claimed for a document on the ground that its disclosure would be contrary to the interests of the public, the Court has always in reserve the power to examine the document for which protection is sought, in order to ascertain whether the public interest would be prejudiced by its production, and to require some indication of the injury which would result from such production.

Robinson v. State of South Australia, [1931] A.C. 704, followed.

Judgment of *Reed, J., ante*, p. 198, affirmed.

Counsel: A. E. Currie, for the appellants; Burnard, for the respondents.

Solicitors: D. W. Iles, for the respondent; **Blair and Parker,** Gisborne, for the Gisborne Fire Board; **F. W. Nolan,** Gisborne, for the remaining defendants.

Case Annotation: *Robinson v. State of South Australia*, E. & E. Digest, Supplement No. 11, title *Constitutional Law*, para. 291j.

SUPREME COURT.
Auckland.
1936.
Sept. 22, 23, 24.
Johnston, J.

IN RE AMALGAMATED BUTCHERS, LIMITED.

Company Law—Private Company—Removal of Director—Petition by him for Winding-up—Removal not in Nature of Conspiracy or Unjust or Improper—Order refused—Companies Act, 1933, s. 169 (*f*).

F. petitioned for an order to wind up a private company of which he was formerly managing director, not because of the position of the company or because he had been removed from the position of a director unjustly, but in order to get rid of his shares and to cease to have any connection with the company, as the nature of the work he was called upon to do was distasteful to him. There was no charge of dishonesty or proof of mismanagement endangering his interest in the company, or of unjust or improper dealing or conspiracy on the part of the other directors.

Held, That H. was not entitled to the relief sought.

Tench v. Tench Bros., Ltd., [1930] N.Z.L.R. 403; **Re Davis & Collett, Ltd.,** [1935] Ch. 693; and **Loch v. John Blackwood, Ltd.,** [1924] A.C. 783, referred to.

Counsel: Cooney and **T. C. Thomson,** for the petitioner; **Bone** and **Fiddes,** for the company; **Munro,** for a creditor.

Solicitors: Cooney and Jamieson, Tauranga, for the petitioner; **Sellar, Bone, and Cowell,** Auckland, for the company; **Oliphant and Munro,** Auckland, for the creditor.

Case Annotation: For *Loch v. John Blackwood, Ltd.*, see E. & E. Digest, Supplement No. 11, title *Companies*, para. 5357a; and *Re Davis & Collett, Ltd., ibid*, para. 5357a.

SUPREME COURT.
Auckland.
1936.
Sept. 7, 8, 30.
Fair, J.

ELLIOTT v. HANSEN.

Contract — Construction — Injunction — Negative Covenant — Deleted words—Inadmissibility of Evidence of deleted Words or of Parties, Knowledge to show their Intention—Mutual Mistake—Whether Court's Discretion exercisable—Code of Civil Procedure, R. 466.

Cl. 4 of an agreement between E. and H. was as follows:—

"Vendor agrees that he will not directly or indirectly be engaged [*or employed either as employer or employee*] in the business of an ironmonger within the County or Borough of Opotiki within a period of five years hereafter."

The italicised words in brackets were deleted by having a line drawn through them, and the alteration was initialled by H.

Prior to the making of the agreement, H. had been carrying on an ironmongery and hardware business in Opotiki in partnership with one C. With the consent of his partner, he agreed to sell and E. to buy his interest in the business, and the agreement, of which the above clause was part, was executed on November 15, 1935. On November 29, 1935, H. accepted employment with the F. T. Co., Ltd. in Opotiki, as manager of its ironmongery and hardware branch,

E. applied for an injunction restraining H. from being so employed.

Richmond, in support; **Hodgson,** to oppose.

Held, refusing the injunction, 1. That, considered independently of the alteration appearing on the face of the agreement, the terms of cl. 4 of the agreement precluded the defendant from accepting employment as a servant within the area of restriction.

Rolfe v. Rolfe, (1846) 15 Sim. 88, 60 E.R. 550; **McCabe v. Licciardi,** (1919) 19 N.S.W.S.R. 275; and **Simmonds and Osborne, Ltd. v. Bigham,** [1931] N.Z.L.R. 502, applied.

2. That the deleted words could not be considered for the purpose of interpreting the agreement.

Inglis v. Buttery and Co., (1878) 3 App. Cas. 552, followed.

Reid v. Hesketh, (1905) 25 N.Z.L.R. 814, referred to.

3. That, as the meaning was not *prima facie* ambiguous, the surrounding circumstances could not be looked at to interpret the agreement.

4. That the equitable rule as to the admissibility of extrinsic evidence to vary an agreement applies to actions for a restrictive injunction which enforces the specific performance or observance of a negative covenant.

Marquis Townshend v. Stangroom, (1801) 6 Ves. Jun. 328, 31 E.R. 1076, and **Lumley v. Wagner,** (1852) 1 DeG. M. & G. 604, 42 E.R. 687, followed.

5. That, as the evidence proved that the plaintiff was endeavouring to enforce a contract which did not represent the real obligation between the parties owing to a mutual mistake in its expression, the Court would not grant the plaintiff the equitable relief asked for.

Duke of Bedford v. Trustees of the British Museum, (1822) 2 My. & K. 552, 39 E.R. 1055; **Doherty v. Allman and Dowden,** (1878) 3 App. Cas. 709; **Manser v. Back,** (1848) 6 Hare 443, 67 E.R. 1239; and **Fowler v. Fowler,** (1859) 4 DeG. & J. 250, 45 E.R. 97, followed.

6. That, on an application under s. 466 of the Code of Civil Procedure, a contract cannot be re-formed by the Court.

Miles v. Hussey, (1909) 28 N.Z.L.R. 382, followed.

Solicitors: Buddle, Richmond, and Buddle, Auckland, agents for **Arrowsmith and East,** Opotiki, for the plaintiffs; **Potts and Hodgson,** Opotiki, for the defendant.

Case Annotation: For *Rolfe v. Rolfe*, see E. & E. Digest, Vol. 28, p. 452, para. 708; *McCabe v. Licciardi, ibid.*, Vol. 43, p. 52, para. 532*i*; *Marquis Townshend v. Stangroom, ibid.*, Vol. 30, p. 389, para. 528; *Lumley v. Wagner*, Vol. 11, p. 400, para. 716; *Doherty v. Allman, ibid.*, Vol. 2, p. 113, para. 953; *Manser v. Back, ibid.*, Vol. 3, p. 7, para. 38; *Fowler v. Fowler, ibid.*, Vol. 24, p. 964, para. 162.

The Proposed New Traffic Regulations.

Far-reaching Changes.

By P. KEESING.

These proposed Regulations, having been circulated to interested bodies, are to be reconsidered in the light of the various representations made. These notes were originally intended only to indicate the general nature of the changes from the existing Regulations, with particular reference to the more important of them, and such comment as might draw attention to points of special interest either to the lawyer or to the road user. Closer examination, however, has disclosed what the writer believes to be serious shortcomings in the proposed regulations, and some criticism has been added with a view to raising such matters for consideration.

In drafting the proposed regulations the attempt has been made to simplify, and this has been achieved to a very great extent. A good deal of superfluous matter has been omitted and many provisions have been consolidated or substantially shortened in form and language, avoiding the prolixity of some of the existing regulations. The pruning-knife, however, has been freely used, resulting in the omission of some seemingly important provisions and, it would appear, in some sacrifice of exactitude, leaving room for doubt or difficulty in interpreting some of the provisions.

As to actual omissions, the writer understands that the intention is that many of the duties of drivers—*e.g.*, signalling intention of turning to the right—be merely covered by s. 4 of the Amendment Act, 1936, which creates the offence of driving " without due care and attention, or without reasonable consideration for other persons." Even if this were accompanied by some code for the education of motorists, it is clear that the irresponsible motorist (in respect of whom traffic laws are primarily needed) will cease to be confronted by regulations expressly requiring the observance of specific driving rules of the greatest importance in the avoidance of accidents ; and the scope of the above offence, as variously interpreted, and in varying circumstances, may take long to include, definitely, breaches of many of the driving rules now proposed to be omitted as specific offences under the Regulations.

Further, in view of the appalling number of serious accidents and of the fact, as indisputably shown by statistics, that breaches of simple driving rules set out in the existing regulations are a major cause of such accidents, and that many such breaches are themselves either actually or potentially highly dangerous, breaches of driving rules can, in many instances, no longer be regarded as minor offences but are becoming more and more needful of severe treatment by the Courts ; and the duties of motorists, and their liability to punishment, ought to be clear and precise to the greatest degree possible, not only to assist the Court in discharging its function of convicting and punishing such offenders, but also in fairness to the motorist himself.

The Regulations are to be divided into parts : Part I relates to Definitions, Administration, and matters affecting traffic generally ; Part II, to Motor-vehicles (with a separate Reg. (16) dealing specially with Motor-cycles ; Part III, to Bicycles ; Part IV, to Other Vehicles ; and Part V, to Pedestrians.

PART I.—GENERAL.

Regulation 2.—Definitions.

Several of the definitions are altered, some more materially than others, and a number of new definitions are added. Notable among the alterations and additions are the following : " Road " is now defined as follows, being as at present defined with the addition of the italicized words :—

> " Road " includes *any road*, street, *footpath*, and any portion of a road, street, or *footpath*, and any way or portion of a way to which the public has access *including a bridge*.

This is merely a widening of the definition, and it is here given in full to assist in considering the next, a new and important definition, that of " Roadway " :

> " Roadway " means that portion of the road used or reasonably usable for the time being for vehicular traffic in general.

As applied to the " Rules of the Road," this definition virtually replaces the definition of " centre-line," given in cl. (1) of the existing Reg. 11—namely, " the middle-line of that portion of the road used or reasonably usable for the time being for vehicular traffic in general." Similarly, the definition of " area of the intersection " (in the Regulation as to " Rules of the Road ") is altered in wording, but not in meaning, by the use of the new word " roadway." " Roadway " is also substituted for " road " in some other clauses throughout the Regulations.

The purposes of this new word in the Regulations are undoubtedly desirable, but the question is raised for consideration whether, in the attempt to simplify, some means could not be found avoiding the difficulties arising in the application of this definition to particular circumstances. First, there is the difficulty of interpreting the words " vehicular traffic in general," both in general, and also with regard to the particular nature of the traffic on a specific road, or even perhaps at a specific time. Secondly, while some clear evidence may be available in some cases as to what portion of a road is actually solely or customarily used, the question what portion is " reasonably usable " may frequently be a matter of opinion or most difficult to establish by ordinary evidence. It may be felt by some that the similar language of the existing Regulations has not caused sufficient trouble in the past to warrant any departure therefrom, even in view of its proposed extended use. It has, however, already caused difficulty in two decided civil cases : *Quedly v. Allen*, [1934] G.L.R. 152, and *Candy v. Maxwell*, [1934] N.Z.L.R. 766, G.L.R. 378, both cases where there was a paved traffic way (concrete in the one case and bitumen in the other), rendering the difficulty far less than it may be in other circumstances. In *Candy v. Maxwell*, Herdman, J., described the definition—*i.e.*, of centre-line, where the same words are used as are now proposed for " roadway "—as " confusing " and further said : " . . . it is of supreme importance that a driver of a motor-vehicle should be able to tell with certainty whether he is or is not on his correct side of the road. A driver should never be left in doubt about that for a moment. . . . "

Another new definition is that of " *Right of way* " as meaning " the precedence in continuing on a course."

A curious, and it would appear erroneous, alteration has been made to the following definition :—

> To " operate " means to use or drive *or ride*, or cause or permit to be used or driven *or ridden*, or permit to be *used* on any road whether the person operating is present in person or not.

This is the same as the existing definition except for

the addition of the *italicized* words. The addition of the word "*used*" appears materially to reduce the scope of the definition. It does not now appear to include the mere permitting to be on a road (unused), as apparently, hitherto. The serious effect of this upon some of the regulations will be mentioned when dealing with them. Even in its old form, the definition did not expressly cover permitting to be, unused, in any place other than a road, a defect (so it would appear) which itself may well be remedied. (As to what places, other than a public road, the authorized scope of the regulations embraces, see *Wallace v. Muir*, [1933] N.Z.L.R. 131, [1932] G.L.R. 180.)

PART II—MOTOR-VEHICLES.

Regulation 7—Lights.

Clause (1) (replacing several existing clauses) is as follows:—

> (1) Save as provided by clauses (9) and (10) hereof, no person shall operate a motor-vehicle during lighting-up time unless it is equipped as provided in this regulation and unless the lights required to be equipped are operated so as to comply with the requirements of this regulation.

This being the cardinal provision of this Regulation as to the duties of drivers thereunder, it would appear that, as to the *use* of the lights with which vehicles are required to be equipped, the provisions do not apply at all unless the vehicle is being "operated" and, as pointed out above, this does not seem to include a vehicle which is merely on a road but which is not "*in use.*" It is true that cl. (10) of the proposed Regulation exempts from the display of the prescribed lights a motor-vehicle which is "stationary on the roadway" (provided the vehicle is lighted from some artificial source), but it can scarcely be said that this exemption itself impliedly imposes a greater obligation than that from which it purports to give exemption. It would further appear, moreover, that there is no express direction to display the lights at all, unless a very liberal interpretation is given to the various clauses—more liberal perhaps than is permissible for provisions intended to create duties, breaches of which are offences. The existing Regulation leaves no such doubt: see, *e.g.*, cls. 14 and 18 of existing Reg. 3. The latter part of cl. (1) (set out above) would probably suffice, if the "requirements" referred to included (but they do not) express directions for the use of the lights which are to be equipped.

It is of interest to note the following:—

"Headlights" are to be known as "driving-lights."

The tail-light, instead of being required "at or near the right-hand side," at the rear of the vehicle, is now to be at the rear of the vehicle "not farther to the left than its extreme centre-line"—perhaps rather an extreme term to apply to a centre-line but its meaning is certainly clear.

No lights, excepting the light illuminating the registration-plate, is specifically required to be white (or other mild tint) as in the existing Regulations; perhaps it is assumed that, as red is specified for the tail-light where that colour is required, the non-mention of any colour for other lights necessarily implies that they are to be "colourless" or perhaps merely that they are not to be red. The existing express prohibition of red lights other than the tail-light (Reg. 3 (11)), and of any red reflector towards the front (Reg. 7 (4)), is, however, completely omitted from the proposed Regulation.

The existing regulation expressly prohibits the use of any lights not authorized by the regulation but expressly permits specified sidelights, interior lights, &c. The proposed Regulation has neither of these express provisions, but, after providing for the usual compulsory lights and permitting spotlights (subject to special conditions), provides that any other lights (unless authorized by the Minister) "*shall be covered with frosted glass or other material which has the effect of diffusing the light.*"

The existing prohibition (cl. 15) of sudden variation of the brilliance of the lights on a moving vehicle is deleted; but the proviso thereto, permitting dimming or the use of sidelights instead of headlights, where there is other artificial light, is preserved but made obligatory by the changing of "may" to "shall."

An important omission is that a side-car of the usual kind attached to a motor-cycle (the combination being apparently within the statutory definition of "motor-cycle") is not required to be equipped with a light (in addition to the light on the cycle itself).

The driving-light on a motor-cycle, however, is to give an effective visibility of the same distance as the driving-light of other motor-vehicles—namely, 150 ft. (proposed Reg. 16, Special for Motor-cycles)—instead of only 90 ft. as is provided for motor-cycles under the existing regulations.

Regulation 8—Brakes.

The regulation as to brakes is reduced from 15 clauses to 8 and is (except as next mentioned) greatly simplified and improved. It is to be noted, however, that the reduced scope of the definition of "*operate*" mentioned above, and the greater reliance placed upon the term, seriously affects these provisions, which do not now appear to apply to a motor-vehicle when it is not in use, whether on a road or elsewhere.

Regulation 9—Warning-devices.

This regulation is reduced from 17 clauses to 5 without any material loss of efficiency, except that the proposed provisions contain no direction to use the warning-devices, with which motor-vehicles must be equipped, when proper to do so (as is provided by cl. (15) of existing Reg. 5); and the failure so to use them is therefore apparently not to be an offence under the proposed Regulations.

Regulation 11—Inspection of Motor-vehicles.

This is a new provision requiring that there shall be carried on every motor-vehicle a "warrant of fitness" in the prescribed form. The warrant may be issued by a person or firm appointed or approved by the Minister, who may apparently be either an officer of the Transport Department or any other person (or firm), but, if the former, a fee of 5s. is payable for each warrant. The warrant is to disclose a "date of examination not earlier than six months before" any time of using the vehicle, and also the speedometer reading at the time of each inspection, and is to contain a certificate that the vehicle complies with the Regulations as to construction, equipment, and condition. The Regulation does not apply to vehicles complying with a license under the Transport Licensing Act, 1931, or a license to carry for hire issued by a competent authority.

Regulation 14—Rules of the Road.

As shown above, the meaning of "centre-line" has not been changed, although its meaning is derived,

in the proposed Regulation, from a definition of "roadway," in place of its own definition as in the existing Regulation. The criticism of such meaning (in either old or proposed Regulations), given earlier in these notes, should be borne in mind in considering the provisions of this Regulation.

Following are the existing and the proposed clauses requiring vehicles to keep to the correct side of the road :—

Existing: Every driver of a motor-vehicle shall keep *as far as practicable* to his left of the centre-line. ("Centre-line" being defined.)

Proposed: Every driver of a motor-vehicle shall *when practicable* keep the vehicle to his left of the centre-line *of the roadway*. ("Roadway" being defined.)

It is to be noted :

(*a*) That the words "as far as practicable" are deleted, bringing the provision back approximately to what it was under the 1928 Regulations, except that under those Regulations a driver travelling at less than fifteen miles per hour was to keep "as near as practicable to his left edge of the road, but clear of earthen water-tables."

(*b*) The rule is now qualified by the words "when practicable," thus introducing a new, and it is thought proper, ingredient, the proof or disproof of which, however, may be occasionally difficult.

(*c*) The alteration fixes the centre-line itself, and not merely the less-exactly-defined farthest-practicable-distance from it, as the crucial division between right and wrong. While such greater exactitude is in general desirable, it is perhaps questionable whether in this case it will not render the question of breach or observance more difficult to decide in many circumstances—more particularly by reason of the (sometimes) indefinite extent of the "roadway," the centre-line of which is in question.

Clause (3) of the existing Regulation, describing the respective duties of drivers of overtaking and overtaken vehicles—namely, to signal the intention to pass, and to move to the left and not accelerate in order to allow the overtaking vehicle to pass, is omitted. But the duty to overtake other vehicles on their right and to clear them by 18 ft. before returning into line is preserved.

The duty to keep to the left of lines marked on the roadway by local authorities continues to apply "at all times" at "corners, bends, or turnings" but is to be observed "so far as practicable" at any other places.

The existing provisions relating to the following are completely omitted : (*a*) To keep to the left of other vehicles, persons, or animals, when meeting same ; (*b*) duties when passing stock ; (*c*) passing trams at stopping-places ; (*d*) when not to pass two other cars which are abreast or meeting ; (*e*) not to overtake at or near intersections, corners, or crests of rises ; (*f*) keeping as near to the left as practicable when making left-hand turns.

The right-hand turn at intersections is covered by the same provision as before, there being no material change of meaning by the use of the new word "roadway," as the terms "centre-line" and "area of the intersection" are already, in the existing regulations, defined with reference to the "used or reasonably usable portions of the road."

The "Off-side Rule" is expressed as previously, except that it is expressly made to apply to actually "crossing," as well as "approaching," an intersection. It is, however, slightly altered in sense (not materially, it is thought) by the limited meaning of "intersection" (as defined in the proposed regulations), being the intersection of "roadways" instead of "roads."

A new "Rule of the Road" requires a driver to "yield the right of way to a pedestrian" at "authorized pedestrian-crossings" (as marked out) and makes it unlawful for any other vehicle to overtake him while so yielding the right of way.

Driver's Signals.

The whole of the provisions under this head are omitted. It will be remembered that they include signalling, by use of the hand or suitable apparatus, the driver's intention to turn to the right or to stop or reduce speed suddenly, or to draw out from a kerb—save in sudden emergency.

Conduct of Motor-vehicles on Roads.

This existing Reg. (13) is also omitted as a separate Regulation, but some of its provisions appear in other parts of the proposed Regulations or are embraced by more general clauses. The following provisions, however, appear to be entirely omitted : Vehicle not to travel backwards for further or longer than is reasonable ; when vehicle not to be on footpath ; prohibiting driving calculated to interfere with a fire brigade or its equipment when in use on an alarm of fire.

Regulation 15—Vehicles Stopping or Stationary.

These provisions are greatly reduced and generalized. For example : Where at present a vehicle must not be stationary "within 6 ft. of a fire-plug," the proposed Regulation states "near any fire-plug" ; where at present within a specified distance from a corner, the new provision is : "so close . . . as to obstruct or be likely to obstruct other traffic."

Regulation 17—Speed.

The existing provision is retained that : "No person shall drive . . . at such a speed that the vehicle cannot be brought to a standstill within half the length of clear road which is visible to the driver immediately in front of the vehicle." But the doubt, hitherto entertained, whether this applies to the distance required to be maintained between two vehicles moving in the same line and direction, is overcome by the further provision that it shall be a defence to the foregoing if the defendant proves that his speed was such that he could stop short of the front vehicle in the event of a sudden stop by the latter. It is perhaps unfortunate that the clause is so framed as to throw the onus on the defendant of proving the non-commission of the breach.

The general speed limit of forty miles per hour over other than paved roads is omitted.

An important deletion, to which few are likely to object, is of the whole of the provision fixing a Table of Speeds applicable in various specified circumstances, at which speeds the onus is placed upon a defendant charged with driving at a dangerous speed under s. 28 of the Motor-vehicles Act.

(*Concluded on p. 304.*)

Braemar Castle.

Viscount Dunedin and his Title.

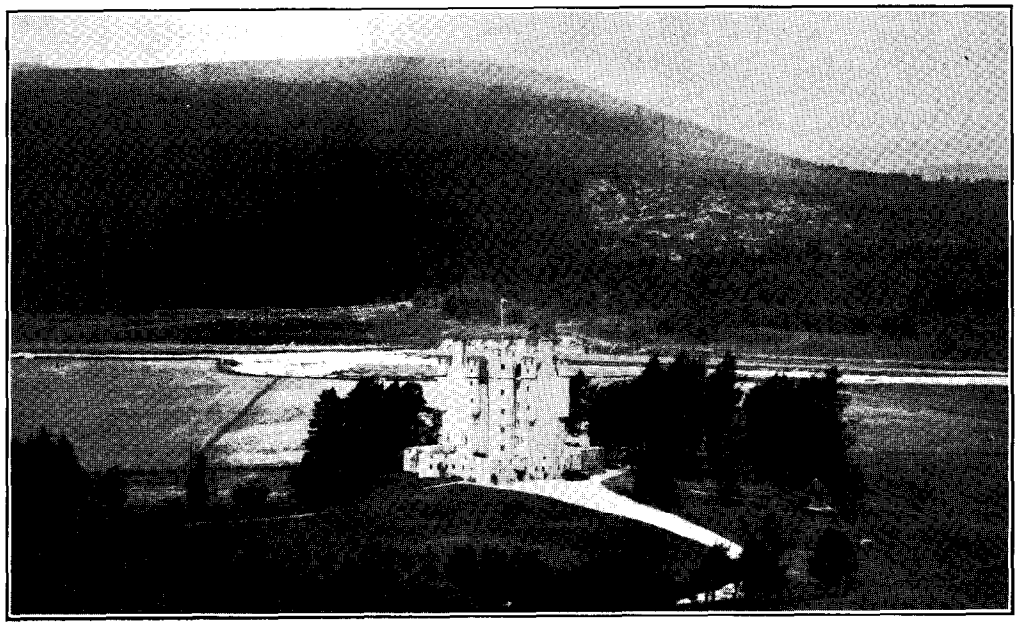
The following letter has been received by air mail from Mr. E. Lawrence Jones, Resident Director for Australia and New Zealand for Messrs. Butterworth & Co. (Aus.), Ltd., who has been overseas for the past six months.

BRAEMAR CASTLE,
BRAEMAR, ABERDEENSHIRE,
September 22, 1936.

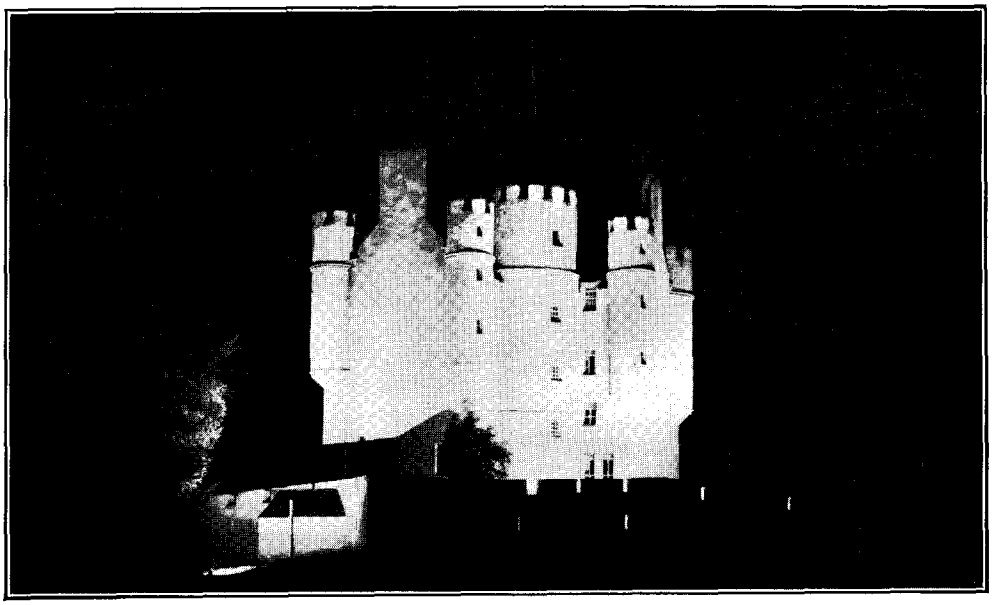
The Editor,
NEW ZEALAND LAW JOURNAL,
P.O. Box 472, Wellington, N.Z.

Dear Mr. Kavanagh,—

My wife and I are staying at the moment with Mr. Stanley Bond, our Chairman, at Braemar Castle on Deeside, and during these last few days I have been constantly reminded of my friends in New Zealand by the wonderful scenery of this beautiful district.



As I think you will be interested, I am sending you two photographs of Braemar Castle. The first shows the Castle with the Dee flowing behind it and the Hills of Invercauld rising on the other side of the river. The other photograph shows the Castle as it appears when floodlit at night. Braemar dates back to the Sixteenth Century and after the rebellion of 1745 it was made the headquarters of the English troops settled on Deeside to control the highlanders. The curtain wall surrounding the base of the Castle was built at this date to protect the unfortunate English soldiers who found that every time they came out of the Castle there was some highland marksman waiting on the hill to pick them off.



One night last week there was a Gillies Fancy Dress Ball at Braemar and Lord and Lady Dunedin dined with us at the Castle, and later Lady Dunedin and Mr. Bond judged the dresses. I was fortunate in being seated opposite Lord Dunedin at dinner and heard him tell the story of how he took his title. As you probably remember, Lord Dunedin before he was raised to the Peerage was the Right Hon. Andrew Graham Murray, and for many years he was the leader of the Scottish Bar. In 1905 he was made Lord Justice General and Lord President of the Court of Session of Scotland, and in 1913 he became a Lord of Appeal. He recounted how, when raised to the Peerage, he found himself in the greatest difficulty in the choice of his title. He could not call himself Lord Graham because there was already a Lord Graham, and it was equally impossible to call himself Lord Murray for the same reason. The house he was then living in had, unfortunately, the name of another ancient Scottish Peerage, so that no help was to be gained in that direction. It was suggested to him that he should take the title of Edinburgh because of his long relation with the Edinburgh Bar. He found, however, that this he could not do because the Barony of Edinburgh is one of the Royal titles. It was then that he had what he described as a brainwave. It occurred to him to use the old name of Edinburgh—the word Dunedin—and he accordingly approached King Edward and, having

explained his difficulty, asked if he would have any objection to his use of this form of the name. King Edward appears to have been most sympathetic with him in his difficulty and assured him he could go ahead with his blessing.

I hope that all my many good friends amongst the legal fraternity in New Zealand are well and I look forward to visiting the Dominion again some time next year. My wife and I are sailing for Australia by the "Orama," on the 16th of October.

With kindest regards,

Yours very sincerely,

E. LAWRENCE JONES.

New Zealand Law Society.

Council Meeting.

(*Continued from p. 285*).

Report of Deputation to Minister of Justice.—A deputation consisting of Messrs. G. G. G. Watson, D. Perry, and the Secretary waited on the Minister of Justice on Thursday, the 30th July, 1936, with reference to various matters, arising mainly out of the last Council meeting. The deputation was accompanied by Messrs. D. G. Johnston and W. N. Smith of the New Zealand Society of Accountants, who supported the representations made in connection with apportionment on the sale of securities. The President (Mr. H. F. O'Leary, K.C.) was occupied in Court and could not attend.

The following were the subjects discussed :—

"(*a*) *Apportionment between Capital and Income on Sale of Government Stock.*—Mr. Perry explained to the Minister the amendment which was desired, and outlined the difficulties under the present law, handing to Mr. Mason a copy of the two reports on the subject previously furnished by the Wellington Committee.

"Mr. D. G. Johnston, on behalf of the Society of Accountants, quoted some specific cases of hardship, and pointed out that from an accountancy point of view there was no real difficulty in making the apportionment, while Mr. Smith gave further illustrations of the injustice caused by the present system.

"Mr. Watson stated that the amendment could be most appropriately made to s. 108 of the Property Law Act.

"The Minister promised to give the matter consideration and later the following letter was received :

"'With reference to the recent representations by your Society and the New Zealand Society of Accountants to the Hon. the Attorney-General on the matter of providing legislation to enable apportionment as between capital and income to be made in cases of purchase or sale of Trust property, I am requested by the Hon. the Attorney-General to advise you that this matter is now under consideration and you will be advised further at an early date.

Yours faithfully,

B. L. DALLARD, Under-Secretary.'

"(*b*) *Amendments to Workers' Compensation Act.*—As these suggested amendments had already been received by Mr. Mason, he indicated that he did not require any discussion concerning them. He wrote later, stating that the resolutions would have full consideration.

"(*c*) *Law Reform : Suggested Committee.*—Mr. Watson informed the Minister that the Society whole-heartedly supported his suggestion to establish a Law Reform Committee. It was thought, however, that the Committee as proposed was too large, and that it might function better if composed of one Judge, the Attorney-General, the Solicitor-General, the Law Draftsman, one member from the University and two from the New Zealand Law Society.

"Mr. Mason said that he thought that a smaller Committee might be preferable, and that he would consider the suggestion made.

"(*d*) *Law Reform Bill.*—Mr. Watson mentioned that the District Law Societies, with one exception, had not yet sent their views on this Bill to the New Zealand Law Society, and asked if it would be possible to have the Bill referred to the Statutes Revision Committee, to which the Society would then make representations.

"Mr. Mason indicated that this would be done if possible.

"*Note.*—The President now desires to report that, accompanied by the Secretary, he waited on the Statutes Revision Committee of the Lower House on August 19 last, and placed before the Committee the views of the New Zealand Law Society and of the District Societies which had written on the matter.

"The President, after discussing various parts of the Bill, mentioned that the Auckland Society had set up a committee to consider in some detail the effect of the abolition of the 'actio personalis' rule, and the Minister of Justice stated that the Bill would not be proceeded with until the report had been received from Auckland.

"(*e*) *Prevention of Profiteering Bill.*—Mr. Watson referred to the above Bill, and criticised adversely the provisions dealing with : (*a*) admission of evidence, (*b*) time-limit of three years for bringing actions, (*c*) taking away the right of appeal.

"The Society was strongly against any tampering with the laws of evidence or removal of the right of appeal, and three years seemed too long a period of limitation for the class of action contemplated by the Bill.

"Mr. Mason said that he would confer with the Minister in charge of the Bill with reference to the points mentioned.

"(*f*) *Five Years' Qualification as a Barrister : Officer Employed in Department of State in Western Samoa.*—Mr. Watson explained that a solicitor, at present a Registrar of the Supreme Court, who had been Crown Solicitor in Samoa for some 11 years, and had also been a Judge of the High Court there, wished to apply for admission as a Barrister under s. 45 of the Law Practitioners Amendment Act, 1935, which permitted an officer employed in legal work in a Department of State to count such service. He found, however, that service in Samoa could not be counted in this way.

"Mr. Watson pointed out that, though the Society was opposed generally to the five years' qualification, nevertheless, as it had approved of practice as a solicitor in Samoa being counted as a qualification, it could not logically oppose the extension to officers doing legal work in State Departments there, and he thought the matter might be dealt with in the Statutes Amendment Act.

"Mr. Mason expressed sympathy with the suggestion, and said he would confer with the Law Draftsman on the point."

The above Report was received, and the action of the Committee as set out in (*f*) approved.

Conveyancing Charges—Request for Ruling.—The following report was received :—

"Under the Scale of Conveyancing Charges approved by the Council of the New Zealand Law Society on July 8, 1927, and now in force—

"(*a*) The fee for a Memorandum of Satisfaction of an Instrument securing a sum up to £500 is £1 11s. 6d.

"(*b*) The fee for a release of a mortgage securing an amount not exceeding £1,000 is £1 11s. 6d.

"(*c*) Where collateral securities are discharged the fee for each discharge is in accordance with the scale governing releases of mortgages having regard to the approximate value of such collateral security as compared with the value of the principal security.

"In the case under consideration the amount secured is £450, the Instrument by way of Security is apparently the principal security, and the amount mentioned as collaterally secured by a Memorandum of Mortgage.

"The proper fee for the Memorandum of Satisfaction is £1 11s. 6d. The proper fee for the Release of the Mortgage is also £1 11s. 6d., unless the further provision to which we now proceed to refer applies.

"Under heading 'General' appears this provision :—

"(*b*) When the same sum is secured by both a Deed and Memorandum of Mortgage, the costs hereinbefore provided for Variations of Terms of Mortgages, Assignments and Transfers of Mortgages, and Discharges of Mortgages shall be one-half more than the scale provided by such paragraphs.

"In our opinion, this provision is limited to the case to which it expressly refers, viz., where the money is secured by a '*Deed and Memorandum of Mortgage*.' This is not the present case, and in our opinion the Mortgagee's solicitors are entitled to £3 3s. as claimed.

L. K. MUNRO.
J. B. JOHNSTON."

The report was adopted. It was suggested that, when a decision was asked for, the Standing Committee should appoint a suitable sub-committee and ask them to report as soon as possible.

The President stated that the suggestion would be considered.

Preparation of Mortgages for Lending Institution at Two-thirds Scale Fee.—The following report was received:—

"We have considered this matter and consider that the question as to whether or not a Solicitor should transact business with such a lending institution should be left to individual practitioners to act as they think fit.

"There is nothing new in such a proposal. Many Building Societies, Friendly Societies, lending institutions, and Government Departments, such as State Advances Corporation, the Public Trustee, and formerly the Government Life Insurance Department, allow solicitors introducing loans to prepare the securities, such Society stipulating the costs the solicitor is to charge the mortgagee, supplying the printed form of mortgage to be used, and stipulating the costs to be charged mortgagors for the preparation and completion of the mortgages: See New Zealand Law Society's Scale of Conveyancing Charges, p. 13.

"The work of the solicitor is thus simplified and resolves itself largely into a matter of the solicitor investigating the title and otherwise making himself responsible for the validity of a mortgagee's security. In an ordinary loan, on the other hand, negotiable by or through a solicitor, he is frequently called upon by the mortgagee to advise upon the appointment of a valuer, to consult with the mortgagee on such valuation, and is frequently asked to advise as to whether the loan should be made. For none of this work does he make a separate charge, being content to be paid the usual scale fee for the preparation of the mortgage.

"In considering the work to be performed by a solicitor introducing a loan to an institution of the kind mentioned in the Auckland Law Society's letter, in carrying out the work of the preparation of the mortgage the work is simplified. The Institution provides its own valuer, the Solicitor is not called upon to advise as to the value, nor is his view sought as to the desirability or otherwise of the security in question. If exception be taken to the proposal of the lending institution, to be consistent then exception should also be taken to the scale imposed upon a solicitor introducing business to a Building Society and to a Government Department, or to the Public Trustee.

"The lower costs of preparing documents securing advances to such an institution as is mentioned in the Auckland Law Society's letter might conceivably be used by the institution as an inducement to prospective borrowers. That, no doubt, is the reason underlying the proposal, but we cannot see how the Society can very well raise any valid objection to the course followed, nor do we consider that the Society's scale for the preparation of mortgages generally is likely to be endangered by the proposal of the lending institution.

A. S. TAYLOR.
"Christchurch, A. F. WRIGHT."
22nd September, 1936."

The report was adopted.

Cancellation of Guardianship Orders in Magistrates Court.—The Minister of Justice wrote, thanking the Society for its suggestions, and stating that the matter would receive careful consideration with a view to introducing the desired amendment at an early date.

Solicitors' Fidelity Guarantee Fund.—(*a*) *Report from Management Committee.*—The Management Committee furnished a detailed report, setting out the present position of the Fund. The President stated that, from his own personal knowledge, the Secretary had done extremely valuable work in connection with the Fund, and that he had saved the Society a very considerable amount. This was confirmed by Mr. Levi.

Mr. A. F. Wright pointed out that the Audit Committee, when considering the new Audit Regulations, might pay attention to the appointment of Auditors, as there seemed to be reason to think that there was some negligence in the smaller Societies in allowing appointments of unsatisfactory Auditors.

On the motion of Mr. Munro, it was decided to ask the Minister of Justice to widen the relative sections of the Law Practitioners Amendment to give the Councils of the District Societies the requisite power to seize the moneys in the Bank Account of a defaulting solicitor. Section 27 of the 1935 Amendment gave power only to the Council of the New Zealand Law Society to take such action, and it was desirable to extend the power to the Councils of the District Societies.

(*b*) *Rules Concerning Claims Against the Fund.*—The new Rules as prepared by the Management Committee were formally adopted by the Council.

Request for Grant to Supplement Travelling Scholarship in Law.—Correspondence from a practitioner in Dunedin, in which he pointed out that the Travelling Scholarship was not sufficient in amount to enable a student to live in England, and asking for some monetary assistance, was considered by the meeting.

The President reported that he had instructed a reply to be sent, regretting that the Council had no power to make any grant, and this action was approved.

Rules Committee.—The Secretary of the Rules Committee wrote, stating that the present appointments expire in December. It was unanimously decided to re-nominate the present members (Messrs. H. F. O'Leary, K.C., P. B. Cooke, K.C., and W. J. Sim) for appointment.

Mortgagees Consents to Leases.—Mr. Perry reported that he had interviewed the Registrar-General of Land on this matter, and had been informed that the latter was fully appreciative of the profession's point of view and did not wish to put anyone to the expense of testing the question, so would give it further consideration.

Section 164, Licensing Act: Proposed Amendment.—The Canterbury Society wrote, suggesting the Licensing Act should be so amended as to enable the Chairman of the local Licensing Committee to extend the hour during which liquor may be sold, served, and consumed on licensed premises, and thus cover such functions as Bar Dinners.

It was stated that he understood this point was already being considered, and it was decided that the Society should take no action.

Uniformity in Rules of District Law Societies.—The Gisborne Society wrote, pointing out the changes in Rules made necessary by the 1935 Amendment of the Law Practitioners Act, and suggesting that the New Zealand Law Society should undertake the work of drafting suitable rules for adoption by all the District Societies.

It was decided to thank Gisborne for the suggestion, which was regarded as a valuable one which could be carried into effect in the future, but that as several of the Societies had just adopted and printed new Rules they could not reasonably be asked to alter these at present.

(*To be continued.*)

Tactics in Court.

By W. Blacket, K.C.

The Tactics of David Buchanan.—Lest some of the tales following should seem incredible, I think I should mention some facts concerning this extraordinary man. In his youth he worked as a butcher boy and delivered meat at West Maitland. Quite probably the discussions he had with housewives as to "the roast he left yesterday" gave him some love of argument and proficiency in repartee. Then occurred a local disturbance between the "Orange" and the "Green" and David hired the local hall and gave an astounding address on "Liberty." Thereupon his admirers said in usual fashion that he "ought to be a lawyer." He agreed with this opinion, and when called to the Bar his gift of emphatic speech, and his never-failing belief in his own abilities, led to renown as a defender in criminal cases. He knew no law, but he "got there just the same."

Before relating his tactics in Court, I may be allowed to mention his tactics out of Court and claim that these, if I may misquote, are "a part of the *res jestry*," and in truth it must be admitted that his professional conduct was the subject of frequent and fierce reproach by other barristers. Blamed for having defended a prisoner on Circuit for £1 5s. 6d., David thought it sufficient justification to say, "Aweel, Ah took every penny the man had." He went to Mudgee Gaol to interview a prisoner charged with embezzlement, and £7 was the fee offered him. He loudly protested against its amount. "Seven pounds is no fee for the employment of my oratory in proving your innocence. You've stolen and you've done other things. Did you never hear of Dr. Gould? He was hanged, man, hanged for forgery, and ye'd no like that." The man protested that he could not get more, but David made a final appeal, "Aweel, you might e'en make it eight pounds ten. Ah ken weel that you stole seventeen pounds, and hawves is a fair thing."

As to his language—even in Court his favourite word was "damnable," and his vocabulary for ordinary use could properly be described by the same adjective. I first met him in '87 on a journey to Bathurst. A washaway on the line made it necessary for the passengers at 2 a.m. on a wet night to walk half a mile to the relief train. I was some distance behind David when we started. He was talking so fiercely and loudly that it seemed as if he was addressing a jury, but when I came near enough to hear the words I thought it must be a jury of bullocks. Never did he forget the saying "sweet are the uses of advertisement." In a railway carriage one of two men, strangers to him, said to the other, "That man Jorkins who owns this run is worth £100,000 now, and yet ten years ago he tried to cut his throat with a butcher's knife." David interposed: "Ah remember his case weel. I defended him for attempted suicide. It was a triumphant acquittal. I got him off on an alibi."

We return to Court. Once an attorney in an absent-minded moment briefed David for the plaintiff in ejectment. The defendant appeared, and David emptied a bagful of deeds on the Bar table: "That's my client's title, y'r Honour," he said, and sat down. "But Mr. Buchanan," said dear old Peter Faucett, J., "you must prove those deeds." "That's my client's title," repeated David "and if they don't prove it there'll be bloodshed."

Still more defiant was his attitude towards Sir William Manning, J., at Armidale. While defending a charge of cattle stealing there, he came into conflict with the Bench and was ordered to "sit down." "Ah'll no sit down," he said angrily, "and Ah'll no be stopped when Ah'm acting in the cause of Liberty; not even though the Heavens should fall upon me—let alone a Supreme Court Judge." And so he went on, but it would not have been safe for him to "call the bluff" of some other Judges then on the Bench.

Billy Bearup of Sandy Flat told Sal's father that Sal was "getting to be a fine lump of a girl all right," and if the fond parent had said, "She is that" Billy would have been entitled to hang up his hat when he next called to see her, and the matter of their courtship would then have rested upon the knees of the gods—or someone else's knees; but he to Billy's remark replied, "Yes, but not for the likes of you." This churlish reply conveyed the information that the old duck-gun would be loaded with a charge of saltpetre intended to cure Billy of his desire to talk to Sal, for such was the crude etiquette of the bush in the "seventies." Billy did call around again and, the gun by some mischance being loaded with duck-shot, he received the charge—well, as he was running away, and Sal's father was charged at Bathurst Assizes with malicious wounding. David Buchanan, for the defence, stormed at the witnesses for the prosecution without getting anything to go upon until the doctor was called. His evidence was plain and seemed unassailable. As David rose to cross-examine he held a book in his hand and was turning over the leaves as though looking for some particular passage; "Doctor," he said, slowly, and still turning over the pages, "have ever you read what is stated in *Brown on Gunshot Wounds* with reference to an injury like this?" "*Brown on Gunshot Wounds*?" said the witness slowly, "No, Mr. Buchanan, I can't say I have—I have never read it." "Do you tell me, Doctor, that you don't know the book—have you never heard of it?" "No, Mr. Buchanan, I don't think I ever have." "Then I'll no ask you another question," and he glared at the jury and said in mingled amazement and disgust: "A doctor who has never heard of *Brown on Gunshot Wounds*!" He depended his whole defence on this want of knowledge of the witness, and told the jury that it was not "rarshional" and would be "damnable" for them to convict on the evidence of a man who had never even heard of this great medical work. There was an acquittal, and as they walked from the Court a junior barrister said, "Isn't it wonderful, Mr. Buchanan, that a doctor who has had the biggest practice in Bathurst for twenty years past should never have even heard of *Brown on Gunshot Wounds*?" "It's not wonderful at all, mon," said David, "Ah never heard of it mysel'." It would have given the show away if I had mentioned that when David had finished glaring at the jury he said to his attorney, "Take that book out of Court and lose it, for if Martin, C.J., calls for it I'll be damnably done."

At Bourke, New South Wales Quarter Sessions, David instructed by Mr. Sixenate, a local solicitor, defended a sheep-stealer, and as there was no other defence David violently attacked Mr. Brown, the prosecutor. To use a term popular with females, he "told him off properly": said that he was "a public disgrace to this great city of Bourke and its people," and that "no one who knew him would ever believe a word that he said" and so on *ad lib.* Still, there was a conviction. Next day the same Mr. Brown was plaintiff in a jury case, an action for slander, in the District Court, and David

appeared for him. Mr. Sixenate appeared for the defendant. David in opening spoke in the highest possible terms of his client's honour and integrity. "That's not what you said about him in Quarter Sessions yesterday," said Sixenate, interrupting. David stopped instantly: turned round so as to face his client, took off his wig and bowing low said very deliberately: "Mister Brown, Ah most humbly and sincerely apologise to you for all that Ah said aboot you in the Quarter Sessions yesterday, for there was not one word of truth in it. Ah was misinformed and misinstructed by a ra-a-ascally scoundrel of an attorney."

There can never be another David Buchanan. I wish there could, for he makes splendid copy.

Legal Literature.

Practice.

Practice Precedents and Statements of Claim, by E. G. RHODES, Deputy Registrar of the Supreme Court at Wellington and Deputy Registrar of the Court of Appeal. With a Foreword by the Hon. Mr. Justice Ostler, and an Introduction by G. G. Gibbs Watson, M.A., LL.B.; pp. xx, 309. Wellington: Butterworth & Co. (Aust.), Ltd.; Auckland: Law Book Co. of New Zealand, Ltd.

A REVIEW BY P. B. COOKE, K.C.

This book will be very useful to the profession and will also be found to constitute a valuable contribution towards the attainment of uniformity in many matters of procedure. The title does not do the book justice, because the contents include not merely a collection of practice precedents and of statements of claim, but also a number of practical notes containing hints and directions that will be of real help to every practising lawyer. These notes are based in part on decided cases and in part on the author's wide knowledge of the practice of the Supreme Court and of the Court of Appeal, and will be of great assistance in the adaptation of the forms to the varied circumstances that constantly arise. The clear and concise form of these notes and the care that has been bestowed on their arrangement are outstanding features of the book. Moreover, its usefulness as a whole is considerably increased by the comprehensive Index and by the Table of Statutes and Rules.

The forms included in Part X under the heading "Miscellaneous" appear to me to be of particular value and to have been chosen with discrimination, and, although no two practitioners will ever agree as to what should and what should not be included in a representative collection of forms, it is safe to say that every practitioner that uses this book will be satisfied that there is no form included in any part of it that could have been omitted without loss to the book. Of one thing I am sure, and that is that the book will receive a warm welcome from the profession, partly because it comes from an author whose extensive experience renders him especially competent to write of the matters with which it deals, and partly because it contains within a very reasonable compass a veritable mine of information on matters of everyday occurrence in common-law practice.

London Letter.

Temple, London,
October 1, 1936.

My dear N.Z.,

The Long Vacation is now drawing to a close and members of the Bar are flocking back to the Temple in preparation for the new term which begins the week after next. What kind of a term it is going to be, it is as yet too early to say as the Cause Lists have not been published; but, judging from the small amount of arrears left over from last term, it does not seem likely that there will be more than a moderate amount of work. So far as is known at present there will be no change on the Bench or in the general order of things.

Lord Wright at Harvard.—While the Lord Chief Justice has spent his vacation in South Africa, the Master of the Rolls, Lord Wright, has visited America, where he attended the Tercentenary celebrations at Harvard University. There a conference was held on the Common Law, which, of course, forms the basis of American law just as it does of our law and yours. I understand that the conference was attended by many Judges from the Dominions and Colonies, but whether any of your Judges were there I have not been able to discover.

Recent Legislation.—It usually happens that I am able to call attention from time to time to Acts of our Parliament which are of special interest to you because they directly or indirectly affect New Zealand, but of the Acts so far passed this year I have not been able to discover any of that calibre. As regards this country, however, there have been several statutes of outstanding importance—namely, the Public Health Act, 1936; the Housing Act, 1936; the National Health Insurance Act, 1936; the Air Navigation Act, 1936; the Tithe Act, 1936. We also have the Coinage Offences Act, 1936, which consolidates the old Coinage Offences Acts. The Tithe Act has probably aroused the most public interest, being yet another attempt to settle the vexed question of tithes.

Justices of the Peace.—There has been a great deal of correspondence in the Press lately with regard to our Justices of the Peace. Some have criticized the whole system of voluntary justices, others have supported it. Many have dealt with the subject from one particular point of view only, and, of these, the vast majority have written of motoring offences. The varying treatment of such offences by different benches of justices certainly lends itself most easily to criticism; and it has now led to the issue of a Home Office Circular, which has been sent to all concerned, pointing out some of the differences that have been noted.

Under our present Act there are several instances of a penalty being provided for an offence, which penalty must be imposed unless in the opinion of the Court there is a "special reason" why it should not be imposed. For instance, where a person is convicted of driving or being in charge of a motor-vehicle while under the influence of drink or drugs, he must be disqualified from holding a driver's license for twelve months unless there is a "special reason." A similar provision is made in the case of a person convicted of failing to insure against third-party risks, and, in the case of a second or subsequent conviction, of driving recklessly or at a dangerous speed.

Statistics have shown that in the first case the penalty has been relaxed in some districts in as many as 70 per cent. of the cases, while in others it has been relaxed in only 10 or 20 per cent., making an average of 30 per cent. over the whole country. In the last-mentioned case (dangerous driving) while the difference between districts is equally striking, it appears that, taking an average of the whole, persons convicted on a second or subsequent occasion of dangerous driving have been disqualified in only 36 per cent. of the cases. This, of course, points not only to the desirability of attaining more uniformity in the treatment of the offending motorist, but also to the urgent necessity for seeing that the law is administered in the spirit intended by Parliament. A "special" reason must be one out of the ordinary and cannot possibly exist in 64 per cent. of dangerous driving cases.

These figures surely supply the answer to the question why, with all the regulations we have with respect to speed limits and the fitness of vehicles and drivers with all the recent road improvements and traffic-signalling apparatus and with all the efforts of the police and the motoring associations, the weekly road casualty lists grow no less.

I have said several times, and I say again, that if only the law was properly administered as it stands to-day, the accidents on our roads would be reduced to at least half their present numbers. A person who has been convicted twice of dangerous driving should not ordinarily be allowed to drive again—it is conceivable that there might be a few cases where he should—and this possibility no doubt accounts for the provision in the statute, but one would not expect such cases to amount to more than 1 or at most 2 per cent. of the total.

This, then, is my criticism of our system of local justices, but it is not an incurable fault. Generally speaking, the system works well. Moreover it has stood the test of centuries. The alternative is a system of paid Magistrates, but while a paid Magistrate, who would, of course, be a qualified lawyer, would no doubt be more expert in applying the rules and tenets of the law, not only would the local Bench lose that local touch but the local magnate would lose that sense of authority which has done so much to preserve the peace and harmony of England's countryside.

Ancient City Ceremonies.—Among the many old ceremonies associated with the City of London is that of the installation of the Sheriffs which takes place at this season each year. The proceedings are held at the Guildhall where the hustings are strewn with sweet herbs. The Lord Mayor presides and the new Sheriffs have their chains of office placed upon them by the outgoing Sheriffs before taking the ancient oaths, by which they swear loyalty to the King and promise to do right to poor and rich and to maintain the good customs of the City. After the installation the Sheriffs give an inaugural breakfast at one of the old City Companies' Halls. This year the breakfast was given at the Grocers' Hall, and was attended by a large gathering of City dignitaries not forgetting the legal profession as represented by Sir Holman Gregory, the Recorder of London, and Sir Henry Curtis Bennett.

Another ancient institution which takes place at this time is the election of the Lord Mayor for the ensuing year. This election is preceded by a service at the Church of St. Lawrence Jewry, which is the Official Church of the City Corporation, where prayers are offered that a right choice may be made. A special invitation to attend this service is extended to visitors from overseas.

A Patient Judge.—Mr. Justice Hawkins was a most patient Judge. He would frequently sit until the early hours of the morning when on circuit in order to finish a case and would continue to listen calmly to the cross-examination of witnesses and the arguments of Counsel as if he had not already done a day's work. On one occasion at Nottingham Assizes the Judge sat on to finish a trumpery case of slander and at a late hour was seen to scribble something on a piece of paper and pass it to a friend. What the Judge had written was "Great Prize Competition for Patience—Hawkins, first prize; Job, honourable mention."

Where two Wrongs made a Right.—A case has been reported to me from the Channel Islands where two motor drivers were brought before the local bench on a charge of negligent driving (or its equivalent), it being alleged that the first driver came round a corner on the wrong side of the road whereas the other, who was proceeding in the opposite direction, also went on to his wrong side of the road. After hearing the evidence the Bench decided that both parties were to blame fifty fifty, and discharged them both.

Yours ever,
H. A. P.

Sixty Years in the Law.

Mr. H. W. Kitchingham.

Mr. H. W. Kitchingham, President of the Westland Law Society, and member of the firm of Messrs. Guinness and Kitchingham, Greymouth, has been the recipient of many congratulations upon the completion of sixty years' continuous association with the legal profession in Greymouth. He entered the firm of Messrs. Guinness and Warner as a junior on October 10, 1876.

Past and present members of the staff of Messrs. Guinness and Kitchingham met at Greymouth, to honour Mr. H. W. Kitchingham, on the completion of his sixty years with the firm, and presented him with an office chair. The presentation was made by Mr. A. Mosley, and all the members of the staff added their tributes to Mr. Kitchingham.

In thanking the donors, Mr. Kitchingham gave a short outline of his connection with the profession. Early in 1876, he commenced work in the Greymouth Foundry, but, on October 10 of that year, he entered the legal office of Messrs. Guinness and Warner, as a junior. In March, 1883, he passed his solicitor's examination; and he was admitted as a solicitor, in Nelson, in June, 1883. For three months, he was a member of the staff of Mr. Caplen, of Hawera. Later, he returned to Greymouth, and joined Mr. (subsequently Sir Arthur) Guinness. On August 1, 1884, eight years after commencing work as a junior, he joined Mr. Guinness as a partner in the firm. That partnership continued until the death of Sir Arthur Guinness, in 1913. Mr. F. A. Kitchingham has since joined his father, as partner, and that partnership still continues, under the style of Messrs. Guinness and Kitchingham.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Deed of Assignment by way of Mortgage of vested Residuary Interest under Will of Deceased.

THIS DEED made the day of 19 BETWEEN A.B. of &c. (hereinafter together with his executors administrators and assigns called "the Mortgagor") of the one part AND C.D. of &c. (hereinafter together with his executors administrators and assigns called "the Mortgagee") of the other part

WHEREAS E.F. of &c. deceased (hereinafter called "the Testator") by his will bearing date the day of 19 after giving certain pecuniary legacies as therein stated gave devised and bequeathed all the rest residue and remainder of the estate both real and personal of whatsoever kind and wheresoever situate of which the Testator should be possessed to which he should be entitled or over which he should have any disposing power at his death unto his trustees upon trust for sale conversion and investment as therein stated and upon the further trust to pay to the Testator's daughter G.F. (hereinafter called "the Life Tenant") during her life the income arising from such investment and directed that after the death of the Life Tenant the said residuary estate and the investments representing the same should be and become the property of such of the others of his the Testator's children whether sons or daughters as should then be living in equal shares

AND WHEREAS the Testator died at on or about the day of 19 and probate of his said will was granted by the Supreme Court of New Zealand at on the day of 19 under Number to W.X. and Y.Z. both of &c. the executors and trustees in the said will named (therein and herein called "the Trustees")

AND WHEREAS the Life Tenant died at on or about the day of 19

AND WHEREAS the Mortgagor as the son of the Testator in common with the other children of the Testator namely H.F. I.F. and J.F. living at the death of the Life Tenant is entitled to a one-fourth equal share of the said residuary estate of the Testator.

AND WHEREAS the said residuary estate of the Testator is now represented by the assets and investments in the names of the Trustees more particularly enumerated in the Schedule hereto

AND WHEREAS the Mortgagee has agreed to lend and advance to the Mortgagor the sum of £ upon having the repayment thereof with interest secured in manner hereinafter appearing.

NOW THIS DEED WITNESSETH as follows:—

1. IN CONSIDERATION of the sum of £ paid lent and advanced to the Mortgagor by the Mortgagee (the receipt whereof is hereby acknowledged) the Mortgagor DOTH HEREBY COVENANT with the Mortgagee FIRST that the Mortgagor will pay to the Mortgagee the above-mentioned sum of £ (hereinafter called "the principal sum") on the day of 19 AND SECONDLY that the Mortgagor will pay to the Mortgagee interest on the principal sum or so much thereof as shall for the time being remain owing hereunder computed from the day of 19 at the rate of £ per centum per annum (reducible as hereinafter provided) by quarterly payments on the days of and in every year the first of such payments to be made on the day of next.

2. FOR THE CONSIDERATION aforesaid the Mortgagor DOTH HEREBY ASSIGN TRANSFER AND SET OVER unto the Mortgagee ALL THAT the said recited one-fourth share of the Mortgagor of and in the said residuary estate of the Testator and the assets and investments representing the same and of and in the proceeds of the realization thereof and all other and further share estate and interest (if any) expectant presumptive vested contingent or otherwise of the Mortgagor of any nature whatsoever in and to the estate of the Testator and any part thereof TO HOLD HAVE AND RECEIVE the same according to the nature and tenure thereof unto the Mortgagee absolutely but subject to the proviso for redemption herein implied.

3. FOR THE CONSIDERATION aforesaid the Mortgagor DOTH HEREBY COVENANT with the Mortgagee as follows:—

(1) The Mortgagor has not nor has any person on his behalf received from the Trustees or any other person the said recited share and interest of the Mortgagor or any part thereof in the estate of the Testator.

(2) The Mortgagor has not nor has any person assigned or purported to assign absolutely or by way of security or otherwise or created any encumbrance or charge upon or affecting the said recited share and interest of the Mortgagor.

(3) The Mortgagor shall and will at all times and from time to time during the continuance of this security procure and furnish the Mortgagee with full and true information concerning the hereby mortgaged premises and the trustee or trustees of the said estate and the condition of the said estate for the time being.

4. AND IT IS HEREBY AGREED AND DECLARED between the parties hereto as follows:—

(1) The covenants conditions and provisions directed by the Property Law Act 1908 to be implied in conveyances by way of mortgage and in mortgages of land shall with the necessary modifications be implied herein except in so far as the same are inapplicable hereto or inconsistent herewith.

(2) This Mortgage is collateral to a certain Memorandum of Mortgage bearing date the day of 19 and registered in the Land Registry Office at under No. the same moneys being secured under the two securities and a default under either one thereof shall be deemed to be also a default under the other.

(3) The Mortgagee shall during the continuance of this security have full power to settle all matters of account compromise and arrange with the Trustees or the trustees for the time being of the said will without being liable for any loss occasioned thereby and the Mortgagor shall be bound by any such settlement of account compromise or arrangement.

(4) [*Proviso for reduction in rate of interest upon prompt payment.*]

(5) The power of sale conferred upon mortgagees by law shall for the purposes of this mortgage be deemed to arise and be exercisable by the Mortgagee if and whenever the Mortgagor shall make default in payment of the principal sum or any part thereof or in the performance of any other covenant expressed or implied in this mortgage or if and whenever the Mortgagor shall make default for the space of [*twenty-one*] days in payment of interest upon the principal sum in accordance with the covenant in that behalf hereinbefore contained or if

and whenever the Mortgagor shall become bankrupt and it shall not be necessary for the Mortgagee before exercising any such power of sale or any incidental or subsidiary power hereunder to give any notice or do or see to the doing of any act matter or thing or wait any period or periods whatsoever other than such period of [*twenty-one*] days in such case above provided. IN WITNESS WHEREOF &c.

SCHEDULE.

[*List of securities and cash at bank and in hand.*]

SIGNED &c.

Legal Literature.

The New Mortgage and Lease Legislation. By C. E. H. Ball, LL.M. Butterworth & Co. (Aus.) Ltd., Wellington—pp. viii, 120.

A REVIEW BY G. R. POWLES, LL.B.

This little book worthily maintains the tradition established by Messrs. Butterworth & Co. of providing the profession with handy guides to the legislation maze. It deals with the Mortgagors and Lessees Rehabilitation Act, 1936, and the Interest and Rent Reductions brought about by the National Expenditure Adjustment Act, 1932, and its amendments.

The method in which the new mortgage legislation is set out will prove useful and convenient.

First, there is a Preliminary Note in which Mr. Ball has summarized in short paragraphs the provisions of the Act. The summary is admirably concise and clear, and gives a good idea of the scheme of rehabilitation the Act is designed to carry out. Then follows the Act itself, set out section by section with annotations following each section in the way to which we are now accustomed. Case references are numerous, and a surprising number of the decisions under the former Acts will be found applicable. There is also a feature which is new in this type of publication and which is very helpful to a proper understanding of the complex provisions—this is, that all terms which are defined by the Act are printed in italic wherever they appear throughout the various sections. There are no less than twenty-eight specially defined terms—the Act providing its own dictionary—and some of these definitions are somewhat artificial, for instance a "mortgagor" is "the owner of the property that is subject to a mortgage," and the term "guarantor" is all-embracing. It is therefore helpful for the reader, when studying any section, to be forcibly reminded by the use of the italic that he must not rely upon his general knowledge of the usual meaning of any particular term; but must turn to the definition. Mr. Ball has carried out his idea to its logical conclusion by referring also to relevant definitions in other Acts. The book is, however, more than an annotation to the Act; for, in many cases, there will be found a note on the substantive law affected and references to standard text-books.

The remaining portion of the book deals in the same manner with the now permanent Interest and Rent Reductions, so that the work as a whole completely replaces the well-worn Kavanagh and Ball's red book.

There is one criticism—the cover, which is green (a good mortgagor's colour) refuses to stay closed on the desk, and persists in curling back and proudly inviting a perusal of the contents. Perhaps this is a thoughtful reminder that the maxim applicable to this Act is "Vigilantibus, non dormientibus, Jura subveniunt."

Practice Precedents.

In Divorce: Order fixing Time for filing Answer by Respondent overseas.

Section 46 of the Divorce and Matrimonial Causes Act, 1928, is as follows:—

Every such petition shall be served on the party to be affected thereby, either within or without New Zealand, in such manner as the Court by any general or special order from time to time directs, and for that purpose the Court shall have and may exercise all the powers it now possesses by law:

Provided that the Court may dispense with such service altogether where it seems necessary or expedient so to do.

Rules 15 to 18 of the Divorce Rules regulate the position as to service. Where personal service can be effected it is not necessary to ask for directions as to service. It is necessary to apply for an order fixing time for filing an answer. It is pointed out that the Jurisdiction is either within or without New Zealand.

In these proceedings the parties were married in England but the Petitioner has acquired a New Zealand domicile and permanently resides in New Zealand. The wife resides in England. In cases of this kind a notice to the Respondent is required to be served with the usual documents. In the case of *Bennett v. Bennett*, [1931] N.Z.L.R. 38, G.L.R. 14, a form of notice has been approved. This form enlarges the form of notice set out in the case of *Liversey v. Liversey*, [1926] N.Z.L.R. 117, G.L.R. 105, para. 5, concerning the legal position in section 18 of the above-mentioned Act. The notice suggested is adopted to the present case and provides that £5 be forwarded to the wife in order that she may seek legal advice.

An affidavit of service is submitted. It is insufficient to say in paragraph 4 that the respondent is "personally known." The means of knowledge or the circumstances of same must be stated.

Attention is drawn to the amended Rule 188 of the Code of Civil Procedure (applicable to Divorce) which provides now that an affidavit may be sworn or made outside New Zealand in Great Britain or any other State of the British Commonwealth of Nations, or in any dependency, colony, protectorate, or mandated territory of any such State before any Judge, Court, Notary Public, or person lawfully authorized to administer oaths in such country. The petition is filed and the citation is issued at the same time or before the motion to fix time is filed.

MOTION FOR ORDER FIXING TIME FOR FILING ANSWER.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District. No.

.....Registry. In Divorce

BETWEEN Petitioner

AND Respondent.

Mr of Counsel for the Petitioner to move before the Right Hon. Sir Chief Justice of New Zealand at his Chambers Supreme Court House on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER fixing the time within which the Respondent may enter an appearance and file an answer to the Petition filed herein UPON THE GROUND that the Respondent resides at in England and that such order is necessary for the proper conduct of the proceedings upon the said Petition.

Dated at the day of 19 .
Certified pursuant to the Rules of Court to be correct.
Counsel moving.

REFERENCE :—Section 46 of the Divorce and Matrimonial Causes Act, 1928.

MEMORANDUM FOR HIS HONOUR :—This is an application to fix time for filing an answer. The parties were married in England, the husband is the Petitioner and is domiciled in New Zealand. The ground of divorce is mutual separation. The wife is now resident in England and as her address is known it is respectfully suggested that 90 days be fixed within which she may file her answer. Rules 15 to 18 of the Divorce Rules cover the position as to the service of these proceedings. Personal service can be effected and an order for directions as to service is therefore not desired or required. It is the practice of this Court to order service of a notice to the Respondent in the form attached to the draft order submitted herewith. The notice is adapted to the circumstances of this case and is taken from the judgment in the case of *Bennett v. Bennett*, [1931] N.Z.L.R. 38, G.L.R. 14.

Counsel moving.

ORDER FIXING TIME FOR FILING ANSWER.

(*Same heading.*)

Before .

day the day of 19 .

UPON READING the Motion for order fixing time for filing the answer of the Respondent AND UPON HEARING Mr. of Counsel for the Petitioner THIS COURT DOTH ORDER that the time within which the Respondent may enter an appearance and file an answer to the Petition filed herein be ninety days from the date of service upon the Respondent of the certified copy of petition and copy of Citation herein AND THIS COURT DOTH FURTHER ORDER that a copy of the notice hereunder written be served upon the Respondent at the time of the service of the said petition and Citation.

By the Court.

Registrar.

NOTICE TO THE RESPONDENT.

This Order fixing the time for filing the Answer of the Respondent has been made by a Judge of the Supreme Court of New Zealand upon certain conditions.

1. The Petitioner alleges that he is domiciled in New Zealand—that is to say, that he is a permanent resident of this Dominion.

2. If the Petitioner has been domiciled in New Zealand for not less than two years he is entitled to sue in the Supreme Court of the Dominion for a divorce based on any ground specified in the Statute laws of the Dominion and no other Court has jurisdiction to entertain a Petition by the Petitioner or grant a divorce on his application.

3. The law of New Zealand is that if a husband and wife by mutual consent agree to separate and such agreement is in full force and has so continued for not less than three years either party may in New Zealand sue for a divorce. Such agreement need not necessarily be in writing, but proof must be given by the Petitioner that there was either an express or implied agreement to separate.

4. The Respondent has a right to appear and defend the suit if she has a defence or desires to bring before the Court any matter relevant to the case or touching the question of alimony or custody of children.

5. Application may be made to the Court either by separate Petition or in the course of the proceedings for alimony or maintenance for the benefit of the Respondent even though the Petitioner may be entitled to the divorce.

6. Lest her absence from the Dominion may impose a hardship on the Respondent His Honour the Judge directs the Petitioner to forward to his wife the sum of £5 in order that she may take advice in case she should desire to defend the suit.

7. If she desires to defend the suit or apply for maintenance she should either directly or through a solicitor in the place where she is send authority to a solicitor in New Zealand instructing him to act for her.

8. The Petitioner by accepting this order, undertakes to repay the Respondent's solicitor the cost of filing an answer to the Petition or filing a Petition for alimony and of appearing before a Judge in Chambers upon an application as to the Respondent's future costs and as to the expenses to which she may be put in proceeding to New Zealand to conduct her defence should she decide to go there.

Registrar of the Supreme Court of New Zealand, at Wellington.

AFFIDAVIT OF SERVICE OF CITATION.

(*Same heading.*)

I of in the County of in England make oath and say as follows :—

1. That the Citation bearing date the day of 19 issued under the Seal of this Court against the Respondent in this cause and now hereunto annexed and marked with the letter "A" was duly served by me on the said Respondent at in the County of in England by showing to her the original under seal and by leaving with her a true copy thereof on the day of 19 .

2. That at the same time and place I delivered to the said Respondent personally a certified copy under Seal of this Court of the Petition filed in this cause and a copy of the Affidavit of the Petitioner sworn in support thereof on the day of 19 and duplicate under Seal of this Court of an Order made herein on the day of 19 having attached thereto a "Notice to the Respondent" authenticated by the Seal of this Court. Annexed hereto and marked respectively "B" and "C" are a copy of the said Affidavit and a copy of the said Order and Notice.

3. That at the same time and place I paid to the said Respondent personally in notes of the Bank of England the sum of £5 in compliance with the terms of paragraph 6 of the said Notice, and I took from the Respondent for the said sum a receipt which is hereunto annexed and marked "D." The signature on the receipt was written in my presence by the Respondent.

4. That the said Respondent has been personally known to me for about twenty years past having lived in the same neighbourhood as myself during that period.

Sworn by the said at in the County of in England this day of 19 Before me :—
Notary Public.

[IN THE ALTERNATIVE]

A Commissioner of the Supreme Court of New Zealand for taking affidavits in England.

Proposed New Traffic Regulations.

(*Concluded from p. 295.*)

Traffic Signs.

All provision as to "Traffic Signs" is omitted, but proposed Reg. 17 (2) contemplates the fixing of speed limits by controlling authorities and the prescribing of Traffic Signs under separate "Traffic Sign Regulations."

As these notes are mainly intended to show the changes from the existing Motor-vehicles Regulations, it is not proposed to deal with the remaining proposed Regulations, comprising Parts III, IV, and V, and dealing respectively with Bicycles, Vehicles other than Motor-vehicles and Bicycles, and Pedestrians.

Rules and Regulations.

Fisheries Act, 1908. Rotorua Trout-fishing Regulations, 1929, Amendment No. 7.—*Gazette* No. 66, October 9, 1936.

Fisheries Act, 1908. Native Land Amendment and Native Land Claims Adjustment Act, 1926. Taupo Trout-fishing Regulations, 1929, Amendment No. 7.—*Gazette* No. 66, October 9, 1936.

Samoa Act, 1921. Samoa High Court Amendment Rules, 1936.—*Gazette* No. 68, October 15, 1936.

Health Act, 1920. Hairdressers' (Health) Regulations Extension, 1936 (No. 2).—*Gazette* No. 68, October 15, 1936.

Education Act, 1914. Average Attendance Regulations.—*Gazette* No. 68, October 15, 1936.

Fisheries Act, 1908. Trout-fishing (North Canterbury) Regulations.—*Gazette* No. 69, October 22, 1936.

Transport Licensing Act, 1931. Transport Licensing (Goods-service) Regulations, 1936.—*Gazette* No. 69, October 22, 1936.